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No.

In The
Supreme Court of the United States

October Term, 1984

JOHN R. CASSILIANO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's Sixth Amendment constituted tional right to be informed of the nature and cause of the criminal charges against him was violated by his indictment, trial and conviction of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, where no specific date or dates on which petitioner allegedly committed any such criminal act was alleged in the indictment, no bill of particulars stating any such date was served although the Court ordered the prosecutor to serve it, and accusing witnesses testified that they did not remember any such date?

2. Whether petitioner's 14th Amendment constitutional right to due process of law was violated by pervasive newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial?

The trial court (SANGIORGIO, J.) decided the above questions in the negative. The Appellate Division of the New York Supreme Court affirmed the judgment convicting the defendant of the said crimes, and an application for leave to appeal to the New York Court of Appeals was denied by the Chief Judge of that Court on August 6, 1984.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Grounds for Invoking Jurisdiction of U.S. Supreme Court 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

A. The Facts 3
B. Proceedings Below 10

Reasons for Allowance of the Writ 12

1. Petitioner's Sixth Amendment constitutional right to be informed of the nature and cause of the criminal charges against him was violated by the superseding indictment, trial and conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, without allegation in the superseding indictment of any specific calendar date on which petitioner allegedly committed any such criminal act. The prosecutor did not serve on the petitioner a bill of particulars stating any such specific calendar date, and accusing witnesses testified that they did not remember any such date. 12

2. Petitioner's Fourteenth Amendment constitutional right to due process of law was violated by pervasive

newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the trial of the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial 21

Conclusion 24

TABLE OF CASES

Irvin v. Dowd, 366 U.S. 717 (1960) 23

Jackson v. Virginia, 443 U.S. 307 (1979) 20

People v. Morris, 61 N.Y. 2d 290 14,15,17,18

Rosen v. United States, 161 U.S. 29 (1895) 16

Russell v. United States, 369 U.S. 749 (1961) 16

Shepard v. Maxwell, 384 U.S. 333 (1965) 23

Thompson v. Louisville, 362 U.S. 199 (1960) 20

United States v. Bagaric, 706 F. 2d 42 (2d Cir., 1983) . 16

United States v. Cruikshank, 92 U.S. 542 (1875) 16

United States v. Salazar, 485 F.2d 42 (2d Cir. 1973) ... 16

United States v. Tramunti, 513 F.2d 1017 (2d Cir., 1975) 16

United States v. Weiss, 491 F.2d 460 (2d Cir., 1974) .. 16

APPENDICES

Appendix A—Judgment of conviction and sentence of imprisonment by Supreme Court of the State of New York, County of Richmond 1a

Appendix B—Order of Appellate Division of New York Supreme Court, Second Judicial Department, July 16, 1984, affirming judgment of conviction 4a

Appendix C—Memorandum decision of Appellate Division of New York Supreme Court, Second Judicial Department, July 16, 1984, affirming judgment of conviction 6a

Appendix D—Certificate of Court of Appeals of the State of New York, August 6, 1984, that leave to appeal to the Court of Appeals is denied. 9a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOHN R. CASSILIANO

Petitioner,

v.

THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND.

GROUNDS FOR INVOKING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

(i) Date of Judgment or decree sought to be reviewed: Order by Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated and entered in the office of the Clerk of that Court on July 16, 1984, which unanimously affirmed a judgment of the Supreme Court of the State of New York, County of Richmond, entered in the office of the Clerk of that Court on January 3, 1983, which adjudged that petitioner is guilty of the crimes of receiving reward for official misconduct in the second degree, a class E felony, defined by section 200.25 of the Penal Law of the State of New York, and that he is also guilty of the crime of official misconduct, a class A misdemeanor, defined by section 195.00 of the said Penal Law.

(ii) An order was made by the New York Court of Appeals on August 6, 1984, which denied petitioner's motion for leave to appeal to the said Court of Appeals from the said Appellate Division order.

(iii) Statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the said order of the said Appellate Division of the Supreme Court of the State of New York by writ of certiorari: 28 U.S.C. Section 2104.

2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertainedby law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subdivision 6 in section 200.50 of the New York State Criminal Procedure Law provides:

"An indictment must contain:
6. A Statement in each count that the offense charged-therein was committed on, or on or about, a designated date, or during designated period of time".

Subdivision 1 in section 240.20 of the New York State Criminal Procedure Law, in part, provides:

"1. Except to the extent protected by court order, upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information or information is pending, the prosecutor shall disclose to the defendant and make available for inspection, the following property:

(h) The approximate date, time and place of the offense charged and of defendant's arrest."

STATEMENT OF THE CASE

A. The Facts

On June 21, 1982, there was filed a superseding indictment of 24 counts. Count 2 accused the petitioner of receiving reward for official misconduct, a class E felony, defined by §200.50 of the Penal Law. Count 15 of the superseding indictment accused the petitioner of obstructing governmental administration, a Class A misdemeanor.

On October 25, 1982, as the trial was beginning, the Court granted the prosecutor's motion to amend count 15 to charge the petitioner with official misconduct, a Class

A misdemeanor. The superseding indictment alleged that such crimes were committed between September 1, 1977 and March 31, 1979.

Previously, on Februrary 16, 1982, petitioner was indicted on 12 counts, which accused the petitioner of rewarding official misconduct in the second degree, a Class E felony, defined by §200.20 of the Penal Law; giving unlawful gratuities, a class A misdemeanor, defined by §200.30 of the Penal Law; and official misconduct, a class A misdemeanor, defined by §195.00 of the Penal Law.

By an order dated May 5, 1982, the Trial Court granted petitioner's motion for a bill of particulars stating, among other things, the "date it is alleged that the defendant committed the offense" (A43). The prosecutor never served and filed such bill of particulars.

Section 240.20(h) of the Criminal Procedure Law required a prosecutor to disclose to a defendant:

> "The approximate date, time and place of the offense charged and of defendant's arrest."

Section 200.95(6) of the Criminal Procedure Law provided that:

"the prosecutor must file with the court a bill of particulars reciting every item of information designated in the order, and serve a copy thereof upon the defendant. Pending such filing and service the proceedings are stayed."

The criminal charges against the petitioner alleged, in substance, that he permitted dumping of waste oil in Brookfield landfill on Staten Island during the 12:00 to 8:00 A.M. work shift; and that as Senior Superintendent in charge of Plant No. 1 in Staten Island, he did not pro-

perly perform his duty to check other installations in Staten Island, including Brookfield which had no supervisor present during the 12:00 to 8:00 A.M. work shift, to see that required equipment and personnel were present and functioning; and that he accepted money for permitting dumping of waste oil in Brookfield, and directing a subordinate to dig a hole in Brookfield for burial of liquid waste therein. Petitioner was not able to prepare and to present a defense that his signatures in the Brookfield time book showed that he was not present in Brookfield on the dates alleged by the indictment, or by accusing witnesses.

Petitioner contends that the absence of an allegation in the indictment that the petitioner committed the aforesaid criminal acts on one or more specific calendar dates, the absence of oral testimony by the accusing witnesses that the petitioner committed the aforesaid criminal acts on one or more specific calendar dates, and their testimony that they did not remember any specific calendar date on which petitioner allegedly committed such crimes, prevented the petitioner from preparing and presenting evidence that he did not commit such crimes on the indefinite dates alleged in the indictment and testified to by accusing witnesses, and thereby invalidated the indictment and conviction of the petitioner of such crimes:

> "during the period from on or about September 1, 1977 to on or about March 31, 1979".

a period of 577 consecutive calendar days, because it lacked specificity in stating the date on which the offense was committed; and that the time from September 1, 1977 to March 31, 1979, consisting of 577 consecutive calendar days, was unreasonably long, and made it impossible to prepare and to present a defense to disprove allegations in the superseding indictment and testimony by prosecution witnesses that the petitioner committed criminal acts of accepting money for permitting the dumping of liquid waste

at Brookfield, and directing a subordinate to dig a hole in the active garbage bank at Brookfield between September 1, 1977 and March 31. 1979.

At Petitioner's trial, six witnesses whom the Trial Court designated as accomplices, and who received immunity from prosecution for crimes committed by them which they admitted, testified against the petitioner.

Anthony Socci, a Tractor Operator employed at Brookfield on the midnight to 8 A.M. shift, testified that some time in 1977, on a date which he did not remember the petitioner asked him to dig a hole with a tractor in the garbage bank at Brookfield, for use in dumping waste oil in such hole by private oil company tanker trailer trucks; that petitioner paid Socci small sums of money for digging such holes, aggregating about $200 for about 15 such holes dug between 1977 and 1978 (A73-205); and that he did not remember any specific calendar dates or any specific amounts of money given him by petitioner (A73-205).

On cross-examination, Socci testified that petitioner told him to dig holes in the garbage bank in "summer time or autumn" (A114), but he previously testified before the grand jury that he only dug holes in the winter time"That's the only time that they had a night tractor operator, during the winter months for the snowplow" (A115); and that petitioner "probably suggested an area" in which Socci shall dig a hole (A118), but he previously told the grand jury that petitioner did not tell him where to dig a hole (A119). Socci told the grand jury that the first hole he dug was five or six feet wide (A123), but he previously testified at a hearing of civil service disciplinary charges against the petitioner that the first hole he dug was twelve feet wide (A123--124).

New York City's Department of Sanititation made excavations, borings and other physical examinations of

sites to which Socci pointed that he dug holes there for dumping waste oil therein, but no physical evidence was found that waste oil was dumped there (A171).

Again, recently, in 1984, the Department of Sanitation had a six foot deep trench dug across Brookfield for a pipe line, without finding any trace of waste oil dumped in Brookfield.

Socci's testimony that waste oil was dumped in holes he dug near the active garbage bank at Brookfield was contradicted by another accomplice, Sanitation Foreman Philip Aiello, who was given immunity from prosecution, and who testified before the grand jury (A337):

"Q. What did the tank trucks do on the active bank?
A. They just spread their oil and water up all over the place."

Q. On the bank?
A. Right, sir.

Q. How did they do that?
A. Opened up their valves and just let it go.

Q. Did you ever see the tank truck dump into any holes?
A. No."

Undisputed testimony by John Rubino, Director of the Bureau of Waste Disposal, was that until November, 1979, spreading oil and water on dirt roads at the active garbage bank at landfills was an accepted and approved practice (A366-368).

Frank Crone, a truckdriver employed by Northeast Oil Co., testified that "we would wait for Johnny to come and he would give us a flashlight to come on up when the hole was dug up there on top" (A124), but he contradicted

himself by also testifying that "Johnny would come by and take us on up or wave us on up and show where the hole was" (A259), but such testimony was contradicted by another accomplice, Anthony Socci, who testified:

"Q. Did anyone have any lighting devices?
A. I had them on; my bulldozer has got four lights on it.

Q. Did you do anything with those lights?
A. Yes. I showed them where to dump."(A91)

Frank Crone testified he did not remember dates as follows:

"The dates, I can't remember, but, I mean, it was quite a few occasions where I was to take it over there and dump it..'76, '77, '78 and '79" (A212).

"I can't remember, dates and stuff like that." (A218).

"The season, I can't remember, I mean, with these conversations, like I told you. I 'm not so good for dates or anything like that." (A218))

"The dates, I can't remember, I don't remember dates. Again, even the year." (A226).

Frank Crone disregarded instructions given him by the District Attorney and testified that he dumped "toxic waste" in Brookfield (A218). The Trial Court denied petitioner's motion for a mistrial (A222), to which petitioner took exception (A222).

James Carruthers, another truckdriver employed by Northeast Oil Co., testified "I met Johnny Cash every time I went to the dump" and that Carruthers talked to petitioner "Practically every time I went to the dump"

(A314-315); but Carruthers was not able to point out the petitioner in the courtroom (A315), and in the District Attorney's office he picked "someone else" from photographs shown to him by the District Attorney (A315-316).

Kenneth Mansfield, a truck driver employed by Newtown Oil Co., testified (A434):

> "Q. Isn't it a fact you cannot give us, with any specificity, any telelphone conversation you had with Cassiliano? Isn't that true?
> A. I cannot give you the day or the time."

Edith Gittleman, a bookkeeper for Newtown Oil Co., testified that she wrote and signed checks drawn on a Northeast Oil Co., bank account which she cashed herself, or Fred Boehm emloyed in the same office went to the bank and obtained the cash which he gave her; and that she gave some of that cash to petitioner for allowing trucks of Northeast Oil Co., to dump waste oil in Brookfield (A485-489). She testified that the checks she signed and cashed at the bank were burned by her boss, Russell Mahler, owner of Northeat Oil Co., (id.). The Bank's photocopies of such checks were not produced at the trial. Independent accountants who examined the financial records of Northeat Oil Co., were not subpoenaed to testify at the trial, and their records were not produced at the trial, Miss Gittleman testified that she could not remember the dates on which she gave money to petitioner or the amounts she gave him (A461-492). She testified:

> "Q. Tell us when was the first time you ever gave one penny to the defendant in this case, Miss Gittleman?
> A. I don't remember.

Q. How about the second time?
A. I don't remember." (A461-462).

Q. ...When was the last time that you gave money to the defendant?
A. I don't remember." (A492).

B. Proceedings Below

On February 16, 1982, a 12-count indictment was filed in Richmond County, New York, which accused the petitioner of rewarding official misconduct, giving unlawful gratuities, and official misconduct, by giving money to a Tractor Operator employed by the City of New York at Brookfield landfill between September 1, 1977 and March 31, 1979, for excavating holes in the active garbage bank at Brookfield into which oil trucks later dumped waste oil, and by permitting oil trucks to dump waste oil in Brookfield. Petitioner pleaded not guilty, and he was released on $2,500 bail.

A court order, dated May 5, 1982, directed the prosecutor to serve and file a bill of particulars stating, among other things, "the date it is alleged that the defendant committed the offense". The prosecutor never served and filed such bill of particulars.

On June 21, 1982, a superseding indictment of 24 counts was filed, which accused the petitioner, among other things, of receiving reward for official misconduct, and official misconduct. Petitioner pleaded not guilty, and his bail was continued. No bill of particulars was served and filed stating the dates or approximate dates on which petitioner allegedly committed the crimes charged. Petitioners's liberty on bail was continued until the trial.

The superseding indictment was tried from October 25, 1982 to November 11, 1982, when a jury found the petitioner guilty of receiving reward for official misconduct and official misconduct; and it found the petitioner not guilty of the remaining charges in the superseding indictment.

On January 3, 1983, the Trial Court gave judgment that the petitioner was guilty of receiving reward for official misconduct, and official misconduct; and it sentenced the petitioner to imprisonment for an indeterminate term with a maximum of three years and minimum of one year and a $5,000 fine for receiving reward for official misconduct, and imprisonment for one year for official misconduct, such sentence to run concurrently with the sentence for receiving reward for official misconduct. Petitioner's bail was continued pending appeal.

Petitioner appealed to the Appellate Division, Second Deparment of the New York Supreme Court, which affirmed the judgment by an order dated July 16, 1984, and said in an accompanying memorandum decison that the susperseding indictment was sufficiently specific under the circumstances of this case.

Petitioner applied to the Court of Appeals of the State of New York for leave to appeal to that Court, but that application was denied on August 6, 1984. No other or further appeal to any New York court is available to petitioner under the New York Constitution and statutes.

On September 21, 1984, the Trial Court (SANGIORGIO, J.) remanded the petitioner to prison, where he is now serving his sentence of imprisonment.

On July 21, 1984, petitioner filed in the United States District Court, Eastern District of New York, a petition for a writ of habeas corpus which alleged that his impending imprisonment would deprive him of his federal constitutional rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to be informed of the nature and cause of the criminal charges against him and to due process of law.

On October 1, 1984, the District Court (COSTANTINO, J.) dismissed the petition.

REASONS FOR GRANTING THE WRIT

1. Petitioner's Sixth Amendment constitutional right to be informed of the nature and cause of the criminal charges against him was violated by the superseding indictment, trial and conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, without allegation in the superseding indictment of any specific calendar date on which petitioner allegedly committed any such criminal act. The District Attorney did not serve on the petitioner a bill of particulars stating any such specific calendar date and accusing witnesses testified that they did not remember any such date.

The District Attorney did not comply with a court order which directed him to serve and file a bill of particulars stating specific calendar dates on which petitioner allegedly committed such criminal acts, but the District Attorney did not comply with such court order; and section 200.95(6) of the New York State Criminal ProcedureLaw provided that the prosecutor:

"Must file with the court a bill of particulars reciting every item of information designated in the order, and serve a copy thereof upon the defendant. Pending such filing and service, the proceedings are stayed."

The prosecutor never served a bill of particulars stating the date or approximate date, on which the petitioner allegedly committed the said crimes. However, the trial was not stayed, although it should have been stayed.

On October 25,1982, as the trial was about to begin, petitioner's attorney asked the Trial Court (RA6):

"I would ask again, at this time, that the People furnish me with the approximate dates so that the defendant Cassiliano might properly defend himself in this Court-house, and without these dates the defendant is at a loss and cannot properly defend himself."

The prosecutor replied (RA7):

"We are unable to be any more specific than those dates, which are presently set forth in the indictment, and I submit to your Honor that the requirements of the contents of an indictment say that it is permissible for the People to state that the crimes charged took place during a period of time as opposed to on a specific date."

The provision in section 200.50(6) of the New York Criminal Procedure Law that an indictment must contain:

"A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time",

was interpreted as not permitting an allegation in an indictment that a crime was committed during more than a reasonable span of time.

In *People v. Morris,* 61 N.Y. 2d 290, 473 NYS2d 769, 772, the Court said:

> "It may be that the interval ascribed for a particular crime is so excessive that, on its face, it is unreasonable and dismissal should follow."

Thus, the Court said in the *Morris* case, *supra,* that an indictment can not constitutionally allege that a crime was committed during an excessive period of time; and that in such a case, the indictment is unreasonable on its face and dismissal should follow.

Section 240.20(h) of the New York Criminal Procedure Law required a prosecutor to disclose to an accused:

> "The approximate date, time and place of the offense charged and of defendant's arrest",
>
> without an alternative provision permitting a prosecutor to state in a bill of particulars "a designated period of time", instead of "the approximate date".

A "Practice Commentary" on section 240.20(h) in McKinney's New York Criminal Procedure Law by Professor Bellacosa reads:

> "New Paragraph (h) is a mere precautionary redundancy. If the indictment and bill of particulars do not disclose the approximate date, time and place of offense and of arrest, if different, then discovery of it must be provided via this paragraph."

The Appellate Division of the New York Supreme Court sustained the indictment, and said (Appendix B, p. 2):

> "We find that the superseding indictment which alleged, inter alia, that on or about September 1, 1977, to on or about March 31, 1979, defendant, then a salaried supervisory employee of the Department of Sanitation, in exchange for money from certain named waste transporters, arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill in Staten Island, was sufficiently specific under the circumstances of this case (see *People v. Morris,* 61 NY2d 290).
>
> In *Morris (supra)* the Court of Appeals stated that an indictment should not be dismissed as defective with respect to the time period alleged for the commission of a crime, if it provides a reasonable approximation, under the circumstances of the individual case, of the date or dates involved. The court made clear that in an indictment a designated period of time, as opposed to a specific date, may be set forth (CPL 220.50], subd 6), and set out the standards to be applied in determining whether an indictment should be dismissed for failure to sufficiently detail when a crime was allegedly committed."

In *People v. Morris,* 61 NY2d 290, 473 NYS2d 769, the interval of time alleged in the indictment was only 24 days, from November 7, to November 30, 1980. In this case, in contrast, the interval of time alleged in the indictment was 577 days, from "on or about September 1, 1977 to on or about March 31, 1979."

In *People v. Morris,* 61 NY2d 290, 473 NYS2d 769, 772, the Court said that in addition to complying with the statutory requirements for an indictment under CPL §200.50, subds, 6, 7, the Sixth Amendment to the Constitu-

tion of the United States requires that an indictment shall protect an accused person's constitutional right "to be informed of the nature and cause of the accusation"; and that this consitutional requirement is satisfied if an indictment "contains such description of the offense charged as will enable (defendant) to make his defense and to plead the judgment in bar of any further prosecution of the same crime", citing *Russell v. United States,* 161 U.S. 29, 34 (1895), and *Russell v. United States,* 369 U.S. at 763-764, (1961).

In this case, the superseding indictment, the bill of particulars, and the testimony of accusing witnesses did not comply with the constitutional requirements laid down in the *Rosen* and *Russell* cases, *supra,* in that the superseding indictment did not describe the offenses of receiving reward for official misconduct, and official misconduct by merely stating that the petitioner committed those offenses, without stating the dates or approximate dates on which petitoner allegedly committed such offenses, and without any other statement or description of such offenses to enable petitioner to make his defense.

In *United States v. Cruikshank,* 92 U.S. 542, 566 (1875), the Court said that in order for an accused to make his defense "with all reasonable knowledge and ability", and in order for an accused to be provided with "full notice of the charge", the indictment should "charge the time and place and nature and circumstances of the offense with clearness and certainty". See, also: *United States v. Weiss,* 491 F.2d 460, 466 (2d Cir., 1974); *United States v. Salazar,* 485 F. 2d 1272, 1277 (2d Cir., 1973).

Citing *United States v. Bagaric,* 706 F 2d 42, 61 (2d Cir., 1983); *United States v. Tramunti* 513 F. 2d 1087, 1113 (2d cir., 1975); and *United States v. Salazar, supra,*

485 F 2d 1272, 1277 (2d Cir., 1973), the decision in *People v. Morris, supra,* 61 NY2d 290, said that when time is not an essential element, the indictment is often permitted to state the time in approximate terms, and that determination must be made on an *ad hoc* basis by considering all relevant circumstances whether an indictment and bill of particulars have given an accused person sufficient specificity to enable him to adequately prepare a defense.

In this case, the superseding indictment did not state the date of the offenses in approximate terms, by stating that they were committed "during the period from on or about September 1, 1977 to on or about March 31, 1979". This allegation did not give the petitioner any information about which one or more specific calendar dates during the 577 consecutive calendar dates embraced by the indictment, the accused allegedly committed one or more criminal acts of receiving reward for official misconduct, or official misconduct. A period of time from September 1, 1977 to March 31, 1979, is not a statement "in proximate terms" of a date of commission of a criminal act. It was impossible for the petitioner to be informed by the superseding indictment and bill of particulars on which one or more specific calendar dates during the 21 month period between September 1, 1977 and March 31, 1979, the indictment charged him with one or more acts of receiving reward for official misconduct, or official misconduct.

The prosecutor did not meet his constitutional burden to present evidence during the trial that he made diligent efforts to obtain from the accusing witnesses more specific information of the actual dates, or approximate dates, on which the petitioner allegedly committed the crimes of which he was found guilty, instead of accepting their testimony that they did not remember such dates.

In *People v. Morris, supra,* 61 NY2d 290, the Court said that consideration should be given to the tender age of the children who were the accusing witnesses in that case, In this case, the accusing witnesses testified that they were accomplices who aided and abetted the petitioner in his commission of the offenses of which he was convicted. But such accomplices did not testify about the surrounding circumstances, and they said they did not remember any specific date.

The prosecutor presented no evidence on these matters. The Court shut off discussion of petitioner's application for specific dates, and said (RA7):

"If he doesn't have them, he doesn't have them."

The prosecutor did not ask accusing witnesses any questions to refresh their recollection of the date, or approximate date, on which petitioner allegedly committed the crime of receiving reward for official misconduct, or official misconduct; and he did not ask such accusing witnesses any questions about physical facts, circumstances and occurrences at or near the times and places at which petitioner allegedly committed one or more such criminal acts.

As a result, the inculpating testimony of the accusing witnesses was limited to short, dry narrative statements by three drivers of oil tanker trucks (Frank Crone; James Carruthers; Kenneth Mansfield), that they drove their trucks to Brookfield landfill, where they opened the petcocks and the liquid flowed out into holes dug by Anthony Socci, a City-employed tractor operator, who gave equally limited testimony about time, place and circumstances of his activities at Brookfield landfill (A76-A205). Edith Gittleman, the alleged pay mistress for these activities

limited her testimony to stating that she gave money to the petitioner, and that she did not remember any date, or any amount of money she gave, or any surrounding circumstances. (A445-A504).Graphic demonstration of the unreliability of such evidence to support conviction of the petitioner was given by James Carruthers' testimony that he saw the petitioner at Brookfield daily, but he was not able to point out the petitioner in court during the trial; and before the trial in the District Attorney's office he picked a photograph of another man as that of the petitioner (A314-315).

Such vague, indefinite and uncertain evidence is legally insufficient to constitute substantial evidence that petitioner committed the crimes charged; and it unconstitutionally deprives the petitioner of liberty without due process of law.

Oral testimony at the trial by accusing witnesses that they have forgotten and they no longer remember the dates, or even the approximate dates on which the petitioner committed the crimes of receiving reward for official misconduct and official misconduct constitutes legally insufficient evidence that the petitioner committed such crimes:

> "during the period from on or about September 1, 1977 to on or about March 31, 1979".

Evidence of the date or the approximate date of commission of a crime is an essential and indispensable element of the accusation and of the finding that the accused committed the crime charged. Without evidence of the date, or the approximate date of commission of a crime, an indictment, and a judgment convicting an accused of a crime are invalid for vagueness and indefiniteness.

Such evidence amounts to no evidence that the accused committed the crime charged, and it requires dismissal of the indictment for lack of evidence.

On appeal to the Supreme Court of the United States, such a case presents a constitutional question "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318 (1979).

In *Thompson v. Louisville,* 362 U.S. 199, 206 (1960). the Court said that it is a "a violation of due process to convict and punish a man without evidence of his guilt."

The provision in 22 USC §2254(d) that:

> "....a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction....shall be preseumed to be correct....unless the existence of one or more of the circumstances respectively set forth in paragraphs (l) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph 8 that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination. . . ."

does not require federal courts to presume the correctness of the judgment of conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, a Class E felony, defined by §200.25 of the New York Penal Law, and of the crime of official misconduct, a Class A misdemeanor, defined by §195.00 of the New York Penal Law, because the jury could not constitutionally find as a fact that the petitioner committed the said crimes without evidence that on a specific calendar date, or approximate date, the petitioner committed such

crimes; and without such evidence, the jury's verdict, and the judgment of conviction based thereon unconstitutionally deprive the petitioner of his liberty without due process of law contrary to the 14th Amendment to the Consititution of the United States.

2. Petitioner's 14th amendment constitutional right to due process of law was violated by pervasive newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the trial of the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial.

Before the trial, and during the trial, the "STATEN ISLAND ADVANCE" daily published and distributed as news, charges attributed by it to un-named persons that the petitioner received large sums of money from oil companies as bribes for allowing their oil trucks to dump toxic chemicals and oil wastes in Brookfield landfill.

Guy Molinari, then a Republican candidate for Congress, published and distributed to owners of new homes in the Arthur Kill area of Staten Island which is near to Brookfield landfill, leaflets and fliers which accused the petitioner of damaging the environment by permitting the dumping of poisonous chemicals and wastes in Brookfield landfill.

Radio and television newscasts daily broadcast statements that the petitioner was indicted for accepting bribes for allowing the dumping of poisonous chemicals and wastes in Brookfield landfill.

As jury selection was about to begin, petitoner's attorney asked the Trial Court to read and consider (RA3-4):

> "approximately thirty to fifty articles talking about this particular case, and talking about the problem with toxic waste.
>
> In addition, I have a flyer from a gentleman by the name of Molinari, who is running for public office.
>
> In that article, it refers to my client as having been indicted and convicted of dumping toxic waste or permitting the dumping of toxic wastes here on Staten Island.
>
> In light of the publicity, I submit the unfair publicity that has been engendered by a consistent and systematic reporting of this case in the Advance, and, more particulary, the highly inflammatory piece of political literature that has been circulated by this gentleman running for public office, I would submit at this time that the defendant, unfortunately, cannot get a fair trial as far as the jurors are concerned, because of what has transpired.
>
> I would ask your Honor to consider this application, and in the interest of justice, to permit an adjournment and/or a continuation of this trial, until some time after December of this year, in the hopes that the public attention that has been received may subside so that we might be able to find jurors who would be fair and impatial...."

While the trial was going on, from October 25, 1982 to November 11, 1982, the Trial Court took no action to control or to limit the stream of newspaper, radio and television statements which accused the petitioner of accepting bribes for permitting the dumping of poisonous chemicals in Brookfield landfill.

The saturation of the minds of the people in Staten Island, including the jurors, with such repeatedly published accusations, poisoned the minds of the jurors, denied to the petitioner a fair trial, and deprived him of his constitutional right to due process of law.

In *Irvin v. Dowd,* 366 U.S. 717, 729-730, (1960), a concurring opinion by Justice Frankfurther stated:

> "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constituted denial of due process of law in its most rudimentary conception."

In *Sheppard v. Maxwell,* 384 U.S. 333, 362-363 (1965, the Court said:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances . . . in addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

Petitioner's counsel asked the Trial Court (RA4);

> "to permit an adjournment and/or a continuation of this trial, until some time after December of this year, in the hopes that the public attention that has been received may subside so that we might be able to find jurors who would be fair and impartial."

In *Sheppard v. Maxwell,* 384 U.S. 333, 364 (1965) the Court said:

"But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

The Trial Court did not grant petitioner's above-quoted application for protection from pervasive prejudicial publicity, which continued during the trial (A240-244).

As to prejudicial publicity during the trial, the Supreme Court said in *Sheppard v. Maxwell, supra, 384 U.S. 333:*

"If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

October 28, 1984.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

APPENDIX A—JUDGMENT OF CONVICTION AND SENTENCE OF IMPRISONMENT BY SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND

Sentence

Of course, the Court has deliberated greatly on this matter, Mr. Lombardino, and has carefully read and reviewed the probation report in this case and has read each and every letter which was received, which was in excess of twenty, including a small book and a poem written for Mr. Cassiliano, and these letters, of course, were received from friends and associates of this man from all walks of life, attesting to the good character and decency of the defendant.

Further, this Court has been able to form to an extent that is, an opinion of the defendant' character from my observations during the course of the trial.

Although I am impressed with what I observed and what I've read in those letters, that John Cassiliano is a decent family man who has been loyal to the City of New York for a period in excess of twenty years, that the crime he was convicted of was not a violent crime, and that this is his first offense and he is not—he does not have a background of criminality; however, I have no choice but also to consider the stark facts in this case, and that is that Mr. Cassiliano's crime was an on-going crime. It was not just an isolated incident.

According to the testimony, it spanned for over, approximately a year and a half. And each time that the defendant allowed the dumping of waste, some being toxic, he did so deliberately, even knowing full well the consequences of his acts or not caring, and he was motivated by

greed. And although the exact amount of enrichment gained by the defendant in this case is undetermed, according to what the testimony revealed, it is likely that it was substantial, and that the harm that was done, that is the dumping of unauthorized liquid waste, being toxic or non-toxic, cannot be undone.

The defendant in this case has betrayed his public trust as evidenced, and he has evidenced a complete disregard for the health and safety of this community.

Lastly, the ramifications of this crime are widespread and serious, and in the interest of insuring the public safety, there must necessarily be sanctions in order to deter this type of conduct in the future.

Accordingly, the Court will now impose sentense with respect to the crime of receiving reward for official misconduct this is an E felony.

It is the judgment of this Court that the defendant be sentenced to an indeterminate sentence of imprisonment which shall have a maximum period of three years, and the Court imposes a minimum period of imprisonment of one year. And in addition thereto, the Court further imposes a fine in the amount of five thousand dollars.

With respect to the crime of official misconduct which is a misdemeanor, it is the judgment of this Court that the defendant be sentenced to a definite sentence of imprisonment for a term of one year which is to run concurrently with the sentence already imposed for the crime of receiving reward for official misconduct.

Any applications at this time?

MR. LOMBARDINO: Yes, The defendant does have an application.

I would like the record to be clear that I am not asking this Court for a stay pending appeal. I am not doing that. As a matter of fact, I am going to go to the Appellate Division to make that request seeking that relief.

However, I do ask the Court to consider granting the defendant a two week adjournment to surrender, so that I can go to the Appellate Division and seek a stay pending appeal from the Appellate Division, Second Department.

THE COURT: Do you want to be heard on that?

MR. MURPHY: People have no objection to that.

THE COURT: All right.

It seems to me that the defendant has no reason to abscond, and as discussed in chambers, there may be a novel question of law which the Appellate Division may want to entertain at this time. Since there is no objections by the District Attorney, the sentence is stayed until January 18, 1983.

MR. LOMBARDINO: Thank you.

APPENDIX B—ORDER OF APPELLATE DIVISION OF NEW YORK SUPREME COURT, SECOND JUDICIAL DEPARTMENT, JULY 16, 1984, AFFIRMING JUDGMENT OF CONVICTION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Deparmtnet. held in Kings County on July 16, 1984

HON. LAWRENCE J. BRACKEN, Justice Presiding,
HON. JAMES F. NIEHOFF,
HON. ISAAC RUBIN,
HON. CHARLES B. LAWRENCE. Associate Justices

The People of the State of New York.

Respondent.

v.

John Cassiliano,

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named John Cassiliano, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Richmond County, rendered January 3, 1983, convicting him of the crimes of receiving reward for official misconduct in the second degree and official misconduct, upon a jury verdict, and imposing sentence; and the said appeal having

been argued by Anthony V. Lombardino, Esq., of counsel for the appellant, and argued by Karen F. McGee, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and the case is hereby remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:
IRVING N. SELKIN

Clerk of the Appellate Division

APPENDIX C—MEMORANDUM DECISION OF APPELLATE DIVISION OF NEW YORK SUPREME COURT, SECOND JUDICIAL DEPARTMENT, JULY 16, 1984, AFFIRMING JUDGMENT OF CONVICTION

LAWRENCE J. BRACKEN, J.P.
JAMES F. NIEHOFF,
ISAAC RUBIN,
CHARLES B. LAWRENCE, JJ.

——AD2dA—— April 5, 1984

2566E The People, etc., respondent v. John Cassiliano, appellant.
(Ind. No. 425/82)

Anthony V. Lombardino, Kew Gardens, N.Y. (Morris Weissberg of counsel). for appellant.

William L. Murphy, District Attorney, Staten Island, N.Y. (Karen F. McGee of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Richmond County (SANGIORGIO, J.), rendered Janaury 3, 1983, convicting him of the crimes of receiving reward for official misconduct in the second degree and official misconduct, upon a jury verdict, and imposing sentence.

Judgment affirmed, and the case is remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

We find that the superseding indictment which alleged. *inter alia,* that on or about September 1, 1977, to on or about March 31, 1979, defendant, then a salaried supervisory employee of the Department of Sanitation, in

exchange for money from certain named waste transporters, arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill in Staten Island, was sufficiently specific under the circumstances of this case (see *People v. Morris,* 61 NY2d 290).

In *Morris (supra)* the Court of Appeals stated that an indictment should not be dismissed as defective with respect to the time period alleged for the commission of a crime, if it provides a reasonable approximation, under the circumstances of the individual case, of the date or dates involved. The court made clear that in an indictment a designated period of time, as opposed to a specific date, may be set forth (CPL 200.50, subd 6), and set out the standards to be applied in determining whether an indictment should be dismissed for failure to sufficiently detail when a crime was allegedly committed.

In applying the *Morris* standards, we note that:

The defendant was charged with continuing and clandestine offenses. The dates are not material elements of the crimes. It is not disputed that the witnesses were unable to provide the precise dates and hours involved, and there is no allegation of bad faith on the part of the People. Moreover, defendant was informed of the nature of the charges, the conduct underlying them, the time span within which they were committed, and the place of the crimes. Thus, the indictment provided reasonable and adequate notice and defendant was not prevented from preparing a defense on the merits, notwithstanding that it would have been easier to prepare and alibi defense if the exact dates and times of the offenses were known and provided. Additionally, the indictment contained such other

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particularity so as to provide defendant with the means of preventing a subsequent prosecution for the same charges.

We have considered defendant's other contentions and find them to be without merit.

BRACKEN, J.P., NIEHOFF, RUBIN AND LAWRENCE, JJ., CONCUR.

July 16, 1984-PEOPLE v. CASSILLIANO, JOHN-2566E

APPENDIX D—CERTIFICATE OF COURT OF APPEALS OF THE STATE OF NEW YORK, AUGUST 6, 1984, THAT LEAVE TO APPEAL TO THE COURT OF APPEALS IS DENIED.

STATE OF NEW YORK

COURT OF APPEALS

BEFORE HON LAWRENCE H. COOKE, CHIEF JUDGE

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

John Cassiliano,

Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief, Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
August 6, 1984

s/Lawrence H. Cooke,
Chief Judge